In the

SUPREME COURT

of the

UNITED STATES

October Term, 1976

76-1647

CASE NO. _____

RICHARD ALAN KATZMAN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTES

This appeal raises the question of the validity of Sections 316.026, 318.14, and 318.18, Florida Statutes.

Section 316.026 is the penalty provision of Chapter 316, the state Uniform Traffic Control Act. This statute provides that infractions of that chapter which do not result in a hearing shall be subject to the civil penalties provided in Section 318.18, Florida Statutes, and infractions which do result in a hearing shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) and/or attendance at a driver improvement school. Section 318.18(3) provides the penalty of twenty-five dollars ($25.00) for all moving violations not requiring a mandatory appearance. Section 318.14(5) provides any person who elects to appear

before a hearing official (any state or municipal judge authorized to preside over a court or hearing adjudicating traffic infractions), shall be deemed to have waived his right to the civil provisions of Section 318.18, and further provides should the hearing official find the infraction had been proved, he may impose a civil penalty not to exceed five hundred dollars ($500.00) and/or require attendance at a driver improvement school.

B. THE PROCEEDINGS BELOW

The Appellant was charged with unlawful speed under Section 316, Florida Statutes (1971). He elected to have a hearing, although none was required under Section 318, Florida Statutes (1974), it being a payable offense. Hearing was set for March 23, 1976, a not guilty plea was entered, and the Appellant found otherwise following the hearing. The Appellant was ordered to pay a thirty-five dollar ($35.00) fine and court costs of six dollars ($6.00). According to the Appellant, he objected to the fine being in excess of twenty-five dollars ($25.00), alleging the statute allowing a larger penalty if a hearing was requested and held in a non-mandatory hearing infraction, was a violation of constitutional due process of law. The hearing official denied the motion on the constitutional question.

The Appellant took an appeal to the Circuit Court in and for Dade County, which Court granted a motion to transfer the case to the Supreme Court of Florida

as a ruling on the constitutionality of a state statute was directly decided by the hearing official.

Appellant's conviction and sentence were affirmed by the Florida Supreme Court, Katzman v. State, 343 So.2d 38 (Fla. 1977), based upon Levitz v. State, 339 So.2d 655 (Fla. 1976). This appeal followed, asserting 28 U.S.C. §1257(2) as the basis for this Court's jurisdiction. On April 18, 1977, Appellant Katzman moved the Florida Supreme Court for a certificate that the following federal questions were passed upon in adjudicating that appeal:

1. Whether the traffic statutes, Fla. Stat., Secs. 316.026, 318.14, and 318.18, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as these statutes have been applied in this case? Appellant's Brief, at Page 6.

2. Whether the traffic statutes, Fla. Stat., Secs. 316.026, 318.14, and 318.18 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as these statutes have been applied to this case? Appellant's Brief, at Page 13.

3. Whether the traffic statutes, Fla. Stat., Secs. 316.026, 318.14, and 318.18 violate the Eighth and Fourteenth Amendments to the United States Constitution, as these statutes have been applied in this case? Appellant's Brief, at Pages 19 and 22.

On May 9, 1977, Appellant's Motion for Certificate was denied by the Florida Supreme Court.

II.

ARGUMENT

The Appellee agrees with Appellant's statement that state government may not take its citizens' property, nor restrain their liberty without according them the due process of law. From this hornbook principle, and a correlative axiom concerning the right to a full and fair hearing being the foundation of due process, the Appellant somehow leaps to the unwarranted conclusion that the mere possibility of receiving a larger and mandatory attendance at a driver improvement school following a hearing on a traffic infraction denies basic constitutional due process.

This Court's decision in United States v. Jackson, 390 U.S. 570 (1968) is heavily relied upon by the Appellant to illustrate the discouragement of the exercise of the constitutional right not to plead guilty, and the deterring of the Sixth Amendment right to demand a jury trial. However, a review of this Court's decisions following Jackson, supra, reveals a distinctly different analysis from that made by the Appellant. In Brady v. United States, 397 U.S. 742 (1970), this Court stated that the decision in United States v. Jackson, supra, did not require that every guilty plea entered under the statute be invalidated, even when the fear of death was shown to have been a

factor in the plea; and that a plea of guilty was not invalid merely because it was entered to avoid the possibility of a death penalty. The decision faced by the defendant in Brady, supra, is closely analagous to the decision facing Appellant Katzman - whether to face the possibility of a heavier penalty should a guilty verdict be returned against him. Speaking to this question, this Court stated, at p. 750:

> Brady's claim is ... that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.
> Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty

> than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

The alternatives facing Appellant Katzman are another example where a plea of guilty could have been made to avoid the possibility of receiving a greater penalty should the state prove his guilt.

In North Carolina v. Alford, 400 U.S. 25 (1970), the defendant plead guilty to second degree murder, although he proclaimed his innocence of the charge, to

avoid a possible death penalty upon a jury conviction of first degree murder. In discussing the effect of a guilty plea, the Court stated at p. 400:

> Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.
> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

In Colten v. Kentucky, 407 U.S. 104 (1972), the appellant was tried in an inferior court, found guilty, and fined $10.00. Under Kentucky law, if he wished to contest the verdict, the next step was by a trial de novo in a court of general criminal jurisdiction. Colten opted for that trial, was found guilty again, and fined this time $50.00. He

appealed this judgment, contending that the possibility of a heavier fine discouraged the exercise of the right to appeal. This Court in setting out justifications for this two-tier system stated at p. 114:

> ... first, in this day of increasing burdens on state judiciaries,these courts are designed, in the interest of both the defendant and the state, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available; second, if the defendant is not satisfied with the results of his first trial he has the unconditional right to a new trial in a superior court, unprejudiced by the proceedings or the outcome in the inferior courts.

The situation is similar here,except instead of a first hearing in the lower court, a person issued a citation for an infraction has the option of pleading guilty, in effect, and paying the fine. This Court in upholding Kentucky's system, stated that it did not penalize someone for taking an appeal, and that the party would be afforded full due process with a fresh determination of guilt or innocence. In language which is applicable to this case, Justice White said at p. 119:

> In reality his choices are to accept the decision of the judge

> and the sentence imposed in the inferior court or to reject what in effect is no more an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. We cannot say that the Kentucky trial de novo system, as such, is unconstitutional.

Finally, this Court's recent decision in Middendorf v. Henry, 425 U.S. 25 (1976) helps lay appellant's argument to rest. In Middendorf, supra, members of the United States Marine Corps brought a class action challenging the authority of the military to try them at summary courts-martial without providing them counsel. The Marines had the choice of facing the summary courts-martial without counsel or to proceed to trial by special or general court-martial, at which they may have counsel, but which would expose them to greater possible penalties. The Court held that the detriment of greater possible penalties faced at a general or special court martial was not constitutionally decisive. It was stated at p. 47:

> We have frequently approved the much more difficult decision, daily faced by civilian criminal defendants, to plead guilty to a lesser included offense. E.g., Brady v. United States, 397 U.S. 742, 749-750, 25 L.Ed.2d 747,90 S.Ct.

> 1463 (1970). In such a case the defendant gives up not only his right to counsel but his right to any trial at all. Furthermore, if he elects to exercise his right to trial he stands to be convicted of a more serious offense which will likely bear increased penalties.
> Such choices are a necessary part of the criminal justice system:
>
> > The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. McMann v. Richardson, 397 U.S., at 769, 25 L.Ed.2d 763, 90 S.Ct. 1441. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.
>
> McGautha v. California, 402 U.S. 183,213, 28 L.Ed.2d 711, 91 S.Ct. 1454 (1971).

It is readily apparent that the statutory scheme for the judicial disposition of traffic infractions challenged here by the appellant, in no way violates due process by subjecting a defendant to the possibility of a higher penalty should he plead not guilty and request a hearing. The Constitution mandates that due process

be afforded, whether the defendant chooses to plead guilty or to demand a hearing. However, the Constitution does not forbid requiring him to choose.

Appellant Katzman also challenges Sections 316.026,318.14 and 318.18, Florida Statutes, on the ground that the overall effect of the statutes is to create two classes of traffic offenders which are treated differently in violation of the Equal Protection Clause of the Fourteenth Amendment. It is the appellant's contention that the two classes of traffic offenders, those who pay the twenty-five dollars ($25.00) fine in advance of a court hearing and those who opt for a hearing, are treated differently because although they may have committed the same infraction, the second class subjects itself to a greater penalty than the first class. In Schnieder v. California, 427 F.2d 1178 (9th Cir. 1970) the appellant alleged that the state statute under which he had been prosecuted violated the Equal Protection Clause by permitting "... different punishment for the same acts, committed under the same circumstances, by persons in like situations." Addressing itself to this contention the court stated at p. 1179:

> Nothing in the constitution requires that persons convicted of the same crime receive identical penalties.
>
> All murderers do not die, nor is every speeder arrested, or if fined,

> fined a similar amount. Disparity of sentences is the subject of much discussion these days but no one has suggested that the discretion of the trial judge as to the sentences to be given in all cases should be eliminated.

Marcella v. United States, 285 F.2d 322 at 324 (9th Cir. 1960) cert. den. 366 U.S. 911 (1961). (Other citations ommitted.)

The analogous situation of plea bargaining discussed in Brady v. United States, supra, also helps defeat appellant's argument of a denial of equal protection rights. Surely it can not be argued that the defendant who pleads guilty and receives a lesser sentence is somehow in a class of persons different from the defendant who goes to trial, is convicted, and receives a heavier sentence. In both instances, each class of persons receive all the due process rights to which they are entitled. It is undisputed that if a defendant chooses to contest the traffic citation, the hearing he is granted comports with due process requirements.

It seems that appellant's argument can be restated that he is generally upset with the trial judge's discretion in levying a penalty following the adjudication of his guilt of the speeding infraction. This discretion is one, however, which is well settled, and not

subject to be set aside in this case. There is nothing in the record to reflect that the hearing officer abused his discretion by fining the appellant thirty-five dollars ($35.00) plus six dollars ($6.00) court costs.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment in the cause by the Supreme Court of Florida.

Respectfully submitted,

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PROOF OF SERVICE

I, WILLIAM C. SHERRILL, JR., one of the Attorneys for Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of June, 1977, I served a copy of the foregoing Motion to Dismiss or Affirm on:

MAURICE ROSEN, ESQUIRE
RICHARD YALE FEDER, ESQUIRE
American Civil Liberties Union
Foundation of Florida, Inc.
16666 N.E. 19th Avenue
North Miami Beach, Florida 33162

by mailing a true and correct copy, in a duly addressed envelope, with postage pre-paid, to these named attorneys of record for Appellant.

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